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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/996,707	11/30/2001	William H. Tew III	WHT-1	3674

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EXAMINER

SPISICH, MARK

ART UNIT	PAPER NUMBER
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1744

DATE MAILED: 09/14/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/996,707

Applicant(s)

TEW, WILLIAM H.

Examiner

Mark Spisich

Art Unit

1744

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 July 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 and 22-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-19 and 22-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 7/2004.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. Claim 7 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The specification (page 9, lines 17-27) states that the purpose of the vinyl layer (810) is to provide abrasion resistance. There does not appear to be support for the recitation that it reduces the absorption of moisture by the foam padding as is now recited in claim 7.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 15 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (USP 2,635,267) in view of **EITHER** Zabron et al (USP 5,906,269) **OR** JP 6-246841. The patent to Smith discloses a produce handling machine comprising a stationary produce-contacting surface (13) on which is attached foam (sponge rubber; column 2, lines 43-45) padding (14a) to reduce bruising of the produce. The patent to Smith discloses the invention substantially as claimed with the exception of the foam including an anti-microbial agent. The patent to Zabron teaches that it is well known to

add an antimicrobial agent to an article or material if it is intended to contact food grade products (column 6, line 44 thru column 7, line 10). It would have been obvious to one of ordinary skill to have incorporated such an agent into any surface of a machine that directly contacts the food article to inhibit bacterial growth. The manner of forming the foam material (claim 19) fails to define over the pad (14a) of Smith. '841 also discloses a foam padding with a myriad of uses and which further includes an anti-microbial agent incorporated therein (see attached Derwent abstract). It would have been obvious to one of ordinary skill to have incorporated such an agent into the foam pad (14a) of Smith to make it more sanitary. **With regard to the addition of the term "vegetative"**, expressions relating the apparatus to contents thereof during an intended operation are of no significance in determining patentability of the apparatus claim. *Ex parte Thibault*, 164 USPQ 666,667 (Bd. App. 1969). Furthermore, the inclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims. *In re Young*, 75 F.2d, 25 USPQ 69 (CCPA 1935). See MPEP 2115. The comment applies to each of the rejections below and for brevity will not be repeated.

4. Claims 15 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schnider et al (USP 2,880,432) in view of **EITHER** Zabron et al (USP 5,906,269) **OR** JP 6-246841. The patent to Schnider discloses a produce handling machine including a stationary produce contacting surface (62) and which further includes a foam (sponge rubber as per column 2, line 41) padding (63) covering at least a portion of the surface to prevent damage to the produce. The patent to Schnider discloses the invention substantially as claimed with the exception of the foam including an anti-

microbial agent. The patent to Zabron teaches that it is well known to add an anti-microbial agent to an article or material if it is intended to contact food grade products (column 6, line 44 thru column 7, line 10). It would have been obvious to one of ordinary skill to have incorporated such an agent into any surface of a machine that directly contacts the food article to inhibit bacterial growth. The manner of forming the foam material (claim 19) fails to define over the pad (63) of Schnider. It would also have been obvious to incorporate such an agent into the foam of Schnider as taught by '841 for the reason stated above.

5. Claims 15-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ross et al (USP 3,651,922) in view of **EITHER** Zabron et al (USP 5,906,269) **OR** JP 6-246841. The patent to Ross discloses a produce handling machine including numerous food contacting surfaces (any one of the conveyor rollers 78 or the **stationary** surfaces 114 and 118 in fig 5 (see column 6, lines 1-7) which cross-hatching is that of foam as well as being the same as the rollers (84), which are disclosed as being a foam. The patent to Ross discloses the invention substantially as claimed with the exception of the anti-microbial agent. The patent to Zabron teaches that it is well known to add an antimicrobial agent to an article or material if it is intended to contact food grade products (column 6, line 44 thru column 7, line 10). It would have been obvious to one of ordinary skill to have incorporated such an agent into any of the food contacting surfaces (including the stationary padded surfaces at 114 and 118) to inhibit bacterial growth. The foam padding material of Ross is preferably closed cell (column 3, lines 4-13) (claim 16) and includes a continuous yet flexible outer layer (89) (column 4, lines

55-60) (claim 17) of plastic or other suitable wear resistant material. The use of vinyl (claim 18) for this material would be an obvious choice of design. The manner of forming the foam padding (claim 19) fails to define over the structure of Ross. It would also have been obvious to incorporate into the foam pad of Ross an agent as in '841 for the reason stated above.

6. Claims 15-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Boyle (USP 6,309,741) in view of JP 6-246841. The patent to Boyle discloses a stationary produce-contacting surface (states that the inventive pad is for placement in a shopping cart) and further including a foam padding covering (column 2, line 24 thru column 4, line 20) at least a portion of said surface to reduce bruising (column 1, lines 31-38). The patent to Boyle discloses the invention substantially as claimed with the exception the anti-microbial agent. '841 discloses the incorporation of an anti-bacterial agent (see attached Derwent abstract) into a foam material having uses in many different environments (including both as a padding for a chair and also in a refrigerator). It would have been obvious to one of ordinary skill to have modified the pad of Boyle as such in order to render the pad more sanitary. The preamble recitation of "produce handling machine" fails to define any particular structure. A preamble is denied the effect of a limitation wherein the claim is drawn to a structure and the portion of the claim following the preamble is a self-contained description of the structure not depending for completeness upon the introductory clause. *Kropa v. Robie*, 88 USPQ 478 (CCPA 1951). To the extent that the claim defines a « machine, the shopping cart of Boyle would meet this recitation in its broadest sense. The foam of Boyle is

preferably closed-cell (column 2, line 26) (claim 16) and is further provided with a flexible outer layer (column 1, lines 52-55) (claim 17). The use of vinyl for this layer (claim 18) would be an obvious choice of design and the pad of Boyle is further molded (column 2, lines 51-52) (claim 19).

7. Claims 1,6-11,22,24 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moore (USP 2,195,371) in view of Ross et al (USP 3,651,922) and further in view of **EITHER** Zabron et al (USP 5,906,269) **OR** JP 6-246841. The patent to Moore discloses produce handling machine comprising a receiver (15,10) a produce washer (essentially the "soaking", "impeller" and "rinse" tanks of fig 1), and a dryer unit (see fig 1a) of the absorbing type. The patent to Moore also discloses numerous fixed and moving surfaces that contact the produce being cleaned. The patent to Ross a plurality of conveyor rollers (78) comprised of closed-cell foam (84) (column 3, lines 4-12) and further discloses **padding (118) for the stationary surfaces** (114,116) and the cross-hatching is that of foam (and it also the same as the portion of the rollers that is foam). It would have been obvious to one of ordinary skill to have provided such padding to any of the fixed surfaces of the machine of Moore to prevent bruising or other damage to the produce. The patent to Ross; however, does not disclose the inclusion of an antibacterial agent in the foam padding. The patent to Zabron discloses a produce handling conveyor which states (abstract, lines 13-16) "if the belting is intended to be used to convey food grade products, preferably an antibacterial agent is incorporated into the elastomeric material to inhibit bacterial growth". The patent to Zabron teaches that one of ordinary skill would incorporate such an agent into any food

contacting surface or material (moving or stationary) in a handling machine so as to inhibit bacterial growth. '841 discloses the inclusion of an antimicrobial agent into a foam material. It would also have been obvious to one of ordinary skill to have modified the padding of Ross in view of '841 for the same reason stated above. The patent to Ross teaches that the padding material would preferably be closed-cell (claim 6). The patent to Ross further discloses a closed-cell padding material (84) which is covered by flexible plastic layer (column 4, lines 54-56) (claim 7). The use of vinyl for this purpose would be an obvious choice of design. The patent to Moore disclose an inspection conveyor (31) including a plurality of parallel rolls (32) (claim 9). The patent to Ross again teaches the use of a foam covering for the conveyor rolls. The patent to Moore also discloses the "sizer" (claim 10) with a drop surface (89). The "packing table" could be the chute (95) (claim 11). The patent to Ross discloses the benefit of padding both movable as well as stationary surfaces of produce handling machine and as such any surfaces of Moore could be suitably padded in order to reduce damage to the produce. Once there is a teaching of the incorporation of an anti-microbial into a food handling surface/material, one would deem it obvious to provide such an agent to any surface of a machine which directly contacted the produce. In fact, it would not make sense to provide it to just one surface thereof. Insofar as claims 20 and 21 are presently understood, they appear to merely duplicate the stationary surface of claim 1 and as such have been grouped together with claim 1. The particular anti-microbial agents of claims 22 and 24 are well known anti-microbial materials (especially silver-based materials). The particular thickness of the padding (118) taught by Ross would be an

obvious design choice to one of ordinary skill. The sole purpose for it being there in the first place is to cushion to the food articles and the thicker the better.

8. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Kurtz (USP 3,242,008). The patent to Moore fails to disclose the recited drape, although the provision of such at the exit of a produce washer is well known (see #24 in Kurtz; USP 3,242,008). It would have been obvious to one of ordinary skill to have provided such a drape at the exit of the washer of Moore to contain the fluid therein. The further inclusion of the antimicrobial into this element would be obvious as set forth above.

9. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Bowman (USP 2,012,655). The patent to Bowman discloses produce washer including rubber scrubbing members (5) (page 2, col 1, lines 1-5). The further inclusion of the antimicrobial into this element would be obvious as set forth above.

10. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Butterworth (USP 3,449,779). The patent to Moore discloses the invention substantially as claimed with the exception of the washer including bristled-brushes. The patent to Butterworth discloses a produce washer with nylon bristles (column 3, lines 44-46). The further inclusion of the antimicrobial into this material would be obvious as set forth above. In fact, DUPONT makes a well-known nylon bristles material (under trademark TYNEX) which including an antibacterial agent therein.

11. Claims 2-5,23 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Newhall et al (USP 2,534,205). The patent to Moore discloses the invention substantially as claimed with the exception of the particular structure of the 'water absorber', although it does disclose a dryer which operates on the same general principle. The patent to Newhall discloses a produce dryer including open cell foam roller (14) as well as wringers (18). It would have been obvious to one of ordinary skill to have substituted any known produce dryer for that of Moore. The further inclusion of the antimicrobial agent into the material of the absorbent rollers (14) would be obvious for the stated reason above.

Response to Arguments

12. Applicant's arguments filed 26 July 2004 have been fully considered but they are not persuasive. Applicant's arguments will be addressed in the order they appear in the "remarks". First, **the addition of the term "vegetative" pertains solely to the article(s) acted on by the claimed apparatus and the recitation of a different article is of no significance in determining patentability of the apparatus claim.**

Again see MPEP 2115. It is further pointed out that claim 15 is drawn to a generic "food handling machine" and there is never a recitation of a structure in the claims which would make it impossible to clean articles other than vegetative ones (such as eggs). In fact, applicant's own specification states that the foam padding may be mounted to any surface to prevent bruising or breaking of the food item (e.g., produce, **eggs**, etc.). The claimed **structure** must define over the structure of the prior art, not merely the article worked on by the apparatus. Applicant is also arguing the references by themselves as

opposed to what they would reasonably suggest to one of ordinary skill. The provision of an anti-microbial agent to anything from shopping carts to cleaning sponges is well known at present as well as at the time of the present invention. The patent to Zabron discloses a handling machine and states (abstract, lines 13-16) that if used to handle food grade products that the portion(s) thereof that contacts the food have an anti-microbial incorporated therein. The particular material having this substance (foam, plastic, fixed, movable) would be obvious to one of ordinary skill based at least in part on common sense. It would be stupid to go to great lengths to incorporate an anti-microbial in one food-contacting surface while leaving the others untreated. The prior art must be analyzed for what it would reasonably teach or suggest to one of ordinary skill and cannot be expected to list every possible surface that it so treated. With regard to the padding (118) of Ross et al (USP 3,651,922), applicant is directed to MPEP 608.02. With regard to JP 6-246841, applicant has "unfortunately" incorrectly characterized the Japanese document. Although '841 does disclose that a foam air filter may be so treated, this is only one of many such uses of the treated foam. One of these is a pad for a chair, which is particularly relevant at least to the rejection based on Boyle. If the mere provision of a skin on the surface of the foam teaches away from so treating the foam, then how does applicant explain a similar layer on their treated foam. Also, one can go shopping and come across even plastic shopping baskets which are so treated with an anti-microbial material and the base material need not be capable of absorbing bacteria to be treated as such. The remaining arguments pertain to the rejection of claims 1+. The patent to Moore (USP 2,195,371) discloses an apparatus

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including numerous "stations" at which different processes are performed on the articles (fruit and vegetables) through it, including a receiver, a washer and a water absorber. As the articles are fed through the apparatus of Moore they would come into contact with a number of fixed as well as movable surfaces (the fixed surface being, for example, on the discharge chute (95)). There are numerous patents of record which teach the provision of a padding material on a fixed surface of a food handling machine so as to prevent damage to the food products as they are fed through the apparatus. Simply because the base reference is silent with regard to bruising does not negate the fact that the food handling art has long recognized this as a problem. One such patent is the patent to Ross et al (USP 3,651,922), which provides a padding material (118) on a fixed surface thereof to prevent bruising or otherwise damaging the articles between fed through the handling apparatus. The cross-hatching of the pad material (118) of Ross et al is the same as the material of the rollers (84) which are said to be a foam material (column 4, lines 43-46). In addition, the cross-hatching of the pad (118) is that of a foam material (see MPEP 608.02). The patent to Zabron discloses a handling machine and also states that if the machine is to be used to handle or convey food that one would incorporate an anti-bacterial into the material of the food-contacting surface(s) (in this case a conveyor belt) (see the abstract, lines 13-16). The patent to Zabron thus **teaches or suggests that any surfaces (whether they are fixed, movable, foam, etc)** in a food handling machine which come in contact with the food during use may have such a material incorporated therein so as to inhibit bacterial growth. **The examiner has never taken the position that the conveyor belting of**

Zabron has been incorporated into the machine of Moore. Applicant states that the examiner has used a piecemeal reconstruction of the prior art. The examiner takes the position that applicant has used a piecemeal analysis of the prior art and merely argued what each reference individually does or doesn't have and essentially asserts that no single reference has all of the claimed subject matter. Such is the nature of a "103" rejection. Using common sense, one of ordinary skill (once the desirability of an anti-microbial in a food handling machine has been known in the art) would want to incorporate such a material into ANY surface of the machine which would be contact the food as it is fed through the machine. Why go through the bother of using it only in one such surface while leaving the other surfaces thereof untreated? The examiner does recognize that the rejections based on JP 6-246841, with the exception of the combination thereof with Boyle regarding claim 15, is not as strong with regard to motivation as Zabron et al but have been maintained in view of the fact that '841 discloses such a myriad of uses for the treated foam as to suggest a number of uses to one of ordinary skill which are not named by '841.

Conclusion

13. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mark Spisich whose telephone number is (571) 272-1278. The examiner can normally be reached on M-Th (5:30-3:00), Alternate Fri off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert J Warden can be reached on (571) 272-1281. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Mark Spisich
Primary Examiner
Art Unit 1744